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### Tariq A Baloch, Unjust Enrichment and Contract

**Citation for published version:**

Carr, D 2010, 'Tariq A Baloch, *Unjust Enrichment and Contract*', *Edinburgh Law Review*, vol. 14, no. 3, pp. 530-32. <https://doi.org/10.3366/elr.2010.0316>

**Digital Object Identifier (DOI):**

[10.3366/elr.2010.0316](https://doi.org/10.3366/elr.2010.0316)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Publisher's PDF, also known as Version of record

**Published In:**

Edinburgh Law Review

**Publisher Rights Statement:**

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primary obligation (in the *condictio*) is restitution in kind which can be for something of no real commercial value like the return of an inaccurate IOU (cf, for Scotland, Bankton 1.8.22). For reasons that apply equally to Scots law, a transferee in German law may also be enriched by receipt of possession and not only of ownership. Some of the very useful discussion of the German case law also finds its mirror in Scots law; e.g. the problems that arise from cohabitation arrangements (cf *Satchwell v Macintosh* 2006 SLT (Sh Ct) 117) and even Melville Monument liability. There are some oddities. In the context of the owner/possessor model and its interface with the related *Verwendung* cases, the content of the claim is presented as “unauthorised expenditure”. But the historical background shows that at issue is both expenditure and the value of services (J Inst 2.1.30).

Part II (chapters 8 and 9) presents a more comprehensive comparative analysis of matters of scope, taxonomy and general approach in German and English law. The author acknowledges the huge debt to Peter Birks: “In spite of or perhaps even because of his tireless work, the English law of unjust enrichment is still not sufficiently settled for a predominantly accepted taxonomy to have emerged” (156). Nevertheless as the author observes, although they are very differently conceived, it is now accepted in English law that, like German law, unjust enrichment comprises different groups of cases with different rules. As regards matters of approach, there is an interesting discussion of some leading cases. *Kelly v Solari* (1841) 9 M&W 54 is examined for its significance for an “unjust factor” or a “without a legal basis” approach. Perhaps the case raises another issue that is not considered, however. The directors of the insurance company had been informed that a policy had lapsed, and the policy even had “lapsed” written upon it but they (plaintiffs) nevertheless forgot and paid out. “Mistake” provided the cause of action. However, since “mistake” is a subjective state of mind and all the facts suggested that the plaintiffs knew that the policy had lapsed, “mistake” could only really have been established from a presumption to that effect because the money was undue. If so, this recalls the Glossatorial “middle way” taken on whether error was, or was not, a positive requirement of the *condictio indebiti*: the answer was that “error” was a positive feature of the claim but a presumption of “error” was raised where the money was undue. I disagree with the author that the lay person would not expect to get back their money if they make a mistaken payment. Following on from the discussion of *Moses v Macferlan* (1760) 2 Burr 1005 the author observes an ingenious “unexpected” similarity between English and German law. The book (chapter 9) then considers what lessons each legal system can learn from the other especially in the light of the debate sparked by Peter Birks’ well known *volte face* that English law should give up the “unjust factor” approach.

Part III (chapters 10 and 11) contains translations of leading German cases and the provisions of the German Civil Code which relate to unjustified enrichment and restitution. All in all, the book is a stimulating, learned and invaluable companion to anyone interested in the subject.

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EdinLR Vol 14 pp 530-532  
DOI: 10.3366/E1364980910001897

**Tariq A Baloch, UNJUST ENRICHMENT AND CONTRACT**

Oxford: Hart Publishing ([www.hartpub.co.uk](http://www.hartpub.co.uk)), 2009. xxiii + 208 pp. ISBN 9781841139081. £45.

The law of unjust(ified) enrichment has been the subject of considerable academic debate for much of the past twenty-five years. This monograph constitutes a new star in the ever expanding

galaxy of enrichment literature, and it is a star which shines brightly. In particular the text provides new interpretative insights into the historical development of the law of unjustified enrichment in English law, as well as examining the “borderland” between the laws of contract and unjust enrichment (v). In setting the scene for the titular concern of the text Baloch addresses familiar shell-marked battlefields: the role of equity in relation to enrichment law, the struggle between approaches based upon unjust factors and those based upon a Civilian-inspired absence of basis, and the difficulties experienced with the implied contract “heresy”.

Therefore, Baloch’s contextual groundwork delves deeply into the crucial eighteenth-century conceptualisation of indebitatus claims, as well as illustrating the importance of contemporary procedure, concluding that such claims were not contractual and rested upon a fictitious promise. Further, the procedural flexibility afforded by an indebitatus claim made it attractive to claimant and judge alike because of its efficiency and broader scope for theorising. In turn, Lord Mansfield consciously developed the action for these reasons and did not draw upon an explicit equitable basis in *Moses v Macferlan* (1760) because the Common Law was already capable of achieving this result. The references to equity by Lord Mansfield in *Moses* do not represent a high equity justificatory premise; rather, they are a much narrower illustration of situations in which a (fictitious and non-contractual) promise would be implied. Yet, this limited role for equity in *Moses* was subsequently interpreted in an extremely broad fashion that degenerated into an essentially discretionary approach resting upon the conscience of the recipient. Such a broad conceptualisation meant that in the nineteenth century liability was stripped back to the nominate situations identified in *Moses*, which in turn triggered the growth of the implied contract theory. It was only in the nineteenth century that Maine, Austin, Evans and Ames began to depart from the implied contract sidetrack in favour of an unjust enrichment analysis.

Having set out his doctrinal history of unjust enrichment, Baloch considers the narrower doctrinal interface between contract and unjust enrichment in modern times. The key rule is that which he labels as the dominant model: “provided the innocent party has terminated the contract for breach, he or she can elect to claim restitution of the value of the benefits transferred under the contract instead of his or her expectation damages”. This rule has been rationalised traditionally as being founded not on contract but on unjust enrichment for (total or partial) failure of consideration. The different claims of scholars in favour of a contractual analysis are rejected by Baloch as historically unjustified. Further, some rest upon arguments requiring broader doctrinal alterations of the concept of contract, while others fail to meet their justificatory policy objectives. Therefore by defending the dominant model, and its independent basis within the law of unjustified enrichment, Baloch turns to the internal dimensions of enrichment law itself.

Perhaps the most notorious dispute within enrichment law is the disagreement about the core essence of the “unjust” component. The central question framed by the leading protagonists in this debate is essentially this: should a benefit be considered to have been conferred in an “unjust” manner if the transfer lacked a legal basis or is the preferable test to say that such a transfer will be unjust if there was a specific “unjust factor” involved? There are many accounts of this debate elsewhere, but for present purposes we may note that Baloch supports the neo-Birksian “pyramid” approach. Essentially, nominate “unjust factors” are relevant by constituting the base of the pyramid through identifying situations which illustrate where the basis of a transfer has failed, but the central question which operates to invalidate the transfer is the absence of basis which is the tip of the pyramid. One may note the similarity of this approach with that of the leading Scottish case, *Shilliday v Smith* 1998 SC 725, whereby the *condictiones* were said to be illustrations of the broader and central principle against unjust enrichment resting upon an absence of basis.

Taking this Birksian doctrinal map, Baloch revisits the “dominant model” arguing that neither it nor its critics define with sufficient precision the meaning of termination with respect to the required failure of condition. By insisting upon a formal termination, which constitutes the required failure of consideration, the dominant model fails to take account of the concept of an apportioned contract whereby individual and severable constitutive conditions of the contract may have failed, hence removing the requisite consideration without ending the contract itself. Therefore, historically a concept of interdependence between promises generated under a contract was formed and counter-performance was only excused if there was a substantial failure to perform from the other party. In time the distinct categories of warranties and conditions developed within the context of the sale of goods as a flexible device which the court would apply, according to the nature of the breach, to determine whether counter-performance should be excused; but as parties began to contract in those terms the courts’ emphasis focused upon the need for a breached condition that justified rescission and an action for money had and received. Therefore a failure of condition is required to ground an action, but the failure of a condition is not the same as insisting upon a terminated contract.

Indeed, arguing that the claim should be confined to contract fails to acknowledge the availability of claims for money had and received in unenforceable but still subsisting contracts, and in contracts which are apportioned. By focusing on the conditional element more narrowly, a better understanding of the intervention of unjust enrichment can be obtained. If there has been a failure of a condition, then a restitutionary remedy will be available because the failure of the condition is also a failure of consideration in terms of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32. The culmination of all this is that there is a two-part enquiry relating to restitutionary intervention in the context of breach of contract. (1) Was the transfer of the benefit conditional? The condition attached to the transfer of the money or other benefit can be a promised counter-performance (promissory condition) and/or some other event not promised by either party (contingent condition). (2) Was there a qualifying failure of condition? If the contract is unapportioned, the qualifying failure coincides with termination of the contract, whereas if the contract is apportioned, termination is not required.

This monograph constitutes a dynamic yet careful reappraisal of the English law relating to unjust enrichment’s role in the context of breach of contract. The analysis generates a number of questions and concepts which a Scottish academic lawyer would benefit greatly from engaging with. Beyond the practical exposition of restitution alongside breach of contract, Dr Baloch makes important claims with respect to the general nature of unjust enrichment in English law, and indeed the historical development of that law. It is to be hoped that some of the protagonists in the field will engage with its important thesis.

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EdinLR Vol 14 pp 532-535

DOI: 10.3366/E1364980910001903

### **Elise Bant, THE CHANGE OF POSITION DEFENCE**

Oxford: Hart Publishing ([www.hartpub.co.uk](http://www.hartpub.co.uk)), 2009. xxviii + 264 pp. ISBN 9781841139654. £60.

Dr Bant’s *The Change of Position Defence* is a revised version of her Oxford doctoral thesis of 2008. Although the defence of change of position was recognised in 1991 in the House of Lords decision *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, this is the first English monograph on the defence.